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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: East West, Inc.

File: B-400325.7; B-400325.8

Date: August 6, 2010

Lawrence S. Sher, Esq., and Steven D. Tibbets, Esq., Reed Smith LLP, for the protester.

Janice Davis, Esq., Davis & Steele, for Integrity National Corporation, an intervenor.
Cheryl S. Mpande, Esq., Department of Health and Human Services, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging procurement integrity violation is denied where the only source selection information disclosed by the agency to the awardee prior to award was that its proposal was in line for award, and protester has not demonstrated that it suffered prejudice as a result of the advance notification.

DECISION

East West, Inc., of Falls Church, Virginia, protests the award of a contract to Integrity National Corporation, of Rockville, Maryland, under request for proposals (RFP) No. 263-2008-P(GG)-0238, issued by the National Institutes of Health (NIH) for custodial services at NIH buildings located in Bethesda, Rockville, and Poolesville, Maryland. The protester argues that agency officials committed a procurement integrity violation by meeting and exchanging procurement-related information with Integrity staff members prior to award of the contract. The protester also argues that NIH officials were biased in favor of Integrity and that the agency failed to conduct a proper investigation of the alleged procurement integrity violation.¹

¹ In a supplemental protest filed after receipt of the agency report responding to the above arguments, the protester further argued that the agency's technical evaluation was flawed; the agency had failed to make a responsibility determination; the agency had failed to evaluate offerors' past performance; and the agency had not justified its
(continued...)

We deny the protest.

BACKGROUND

This is East West's third protest of this procurement, which contemplates the award of a 5-year (1 base plus 4 option years) indefinite-delivery/indefinite-quantity contract to the offeror whose proposal represents the best value to the government, technical, cost/price, and past performance (in order of importance) considered. The agency received and evaluated initial proposals during August/September 2008. The contracting officer initially established a competitive range of three proposals; after we sustained a protest by an offeror whose proposal had been excluded, see Arc-Tech, Inc., B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53, the contracting officer established a competitive range of five proposals. The agency invited the five firms to submit revised price proposals by May 13, 2009. Both East West and Integrity responded by reducing their proposed prices--Integrity by approximately [deleted], and the protester by approximately \$1 million. Agency Report (AR), Tab 39. The agency contract specialist sought a rationale for the reduction from each. While Integrity explained that its lowered price was the result of a [deleted] (and the protester attributed the reduction in its price to [deleted]), id., the contract specialist did not ask the technical evaluation panel to consider the impact of these changes on its evaluation of the offerors' technical approaches.

On November 4, 2009, the agency contract specialist, with the concurrence of the contracting officer, determined that Integrity's proposal represented the best value to the government. The source selection decision contained no trade-off analysis--it simply noted the offerors' technical scores ([deleted] for East West and [deleted] for Integrity), evaluated prices (approximately [deleted] million for East West and

(...continued)

selection of Integrity's [deleted]-rated, [deleted]-priced proposal. Prior to the due date for its report responding to these grounds of protest, the agency notified us that it intended to take corrective action in response to them. Specifically, the agency advised us that it intended to notify offerors in the competitive range that the evaluation criteria have been amended; invite these offerors to submit revised proposals; evaluate the revised proposals; conduct discussions; obtain and reevaluate past performance information (according to the agency, the past performance evaluation documents were lost when the contracting officer's computer crashed); make a new source selection decision; and assess the responsibility of the firm selected for award. Because the agency has granted the protester appropriate relief with regard to its supplemental grounds of protest, we dismiss the arguments.

approximately \$34.5 million for Integrity), and past performance ratings ([deleted] for all competitive range offerors), and concluded that Integrity's proposal represented the best value to the government.

The day after the source selection decision was signed, the contract specialist and the agency project officer met with Integrity personnel "to address questions of the Project Officer, Contracting Officer and Integrity, and to offer Integrity an unofficial contract if Integrity agreed to the terms and conditions of the contract." Contracting Officer's Statement of Facts and Circumstances, June 24, 2010, at 3. The contracting officer recounts that the project officer opened the meeting by expressing concern over Integrity's [deleted]; in response, Integrity furnished the same explanation that it had provided when asked by the agency to explain its reduction in price. Further, the contract specialist explained that the agency could not make an official award yet because it had not received required Equal Employment Opportunity (EEO) clearance from the Department of Labor. During this meeting, Integrity's project manager asked if she could meet with staff members of the two incumbent contractors (East West and LT Services), discuss delivery dates for supplies with the project officer, and review the floor plans for one of the buildings to be cleaned. At the same time, Integrity's president asked if Integrity could begin internal preparations for performance. According to the contracting officer, the contract specialist denied the first two requests, but granted the last two. Id. at 3-4.

By letter dated November 6, East West complained to the contract specialist that an Integrity representative had visited its offices on November 5 and 6, interviewed its employees, and demanded information regarding staffing levels and equipment under East West's current contract with NIH. East West noted that it had not been informed of an award and asked the agency to provide it with the required written notice of award, or, if an award had not yet been made, to "share whatever information [the agency had] regarding the reason that a representative of Integrity visited our office yesterday" and to "direct representatives from Integrity to cease contacting East West or its employees." Protest, Attach. E. On November 12, counsel for East West sent the contract specialist a letter reiterating the above concerns. The following day, the contract specialist responded by letter that, while a decision had been made, no official award had occurred, and that he was "unclear as to why a representative from [Integrity] is (was) in communication with your staff." Id., Attach. G. The contract specialist further noted that he had contacted Integrity and requested that it not communicate further with East West staff members until the agency had made an award and notified all parties.

On November 18, NIH received the EEO clearance letter, and on November 24, the agency awarded a contract to Integrity. On November 30, the contracting officer notified East West of the award. East West immediately requested a debriefing and

protested to our Office on December 4. Because this protest was filed prior to the debriefing, we dismissed it as premature.

The agency provided the protester with a written debriefing on December 22, and East West filed a second protest with our Office on December 23. East West alleged that NIH personnel had violated the Procurement Integrity Act by meeting and exchanging information with Integrity staff members prior to award of a contract, and by failing to investigate the apparent procurement integrity violation once East West had notified the agency of it. The protester also alleged that the price/technical tradeoff determination selecting Integrity for award was unreasonable and inconsistent with the RFP's evaluation scheme. On January 20, 2010, 2 days before the agency report responding to these allegations was due, NIH notified us that it intended to take corrective action in response to the protest. Specifically, the agency advised us that it would suspend contract performance, conduct an investigation of the alleged procurement integrity violations, and take corrective measures if the investigation established that a violation had occurred. The agency further advised us that it would conduct and document a price/technical tradeoff analysis. By decision dated January 27, we dismissed East West's protest as academic because the agency had granted the protester the relief that it sought.

On February 18, the contract specialist initiated an investigation of the alleged procurement integrity violation. By letter dated March 13, counsel for East West complained to agency counsel that it was inappropriate for the contract specialist to conduct the investigation because allegations concerning his conduct had been raised. By email message of March 18, agency counsel concurred and advised that the contracting officer, in consultation with counsel, would instead conduct the investigation. The contracting officer completed her investigation in late March and found no evidence that Integrity had received source selection or procurement sensitive information, or that it had "somehow [become] privy to information that gave it a competitive advantage." AR, Tab 11, Determination and Findings-- Investigation of Alleged Procurement Integrity Violations, at 7. She further found that "[s]ource selection had already occurred, and was not influenced by the November 5, 2009 meeting and subsequent actions taken by Integrity," and that there was no evidence that a procurement integrity violation had occurred. Id.

On April 20, the contracting officer performed a best value tradeoff determination. She observed that while East West had received [deleted] scores than Integrity under all three of the technical evaluation factors, the difference in scores under the personnel and corporate experience/capability factors was minimal, with East West receiving a combined total of [deleted] (of a possible 50) points, and Integrity receiving [deleted]. With regard to the technical approach and understanding factor, under which East West had received a score of [deleted] and Integrity a score of

[deleted], the contracting officer noted that the technical panel had found the two offerors equal in their ability to satisfy the minimal level of performance. She further noted that Integrity's price was [deleted] and concluded that East West's [deleted] technical score did not justify the payment of a price premium since both offerors were capable of performing the work. By letter dated May 18, the contracting officer notified East West that Integrity had again been selected for award. After requesting and receiving a debriefing, East West protested to our Office on May 24.²

DISCUSSION

East West contends that NIH officials committed a procurement integrity violation by sharing "procurement-related" information with Integrity regarding the contract award prior to making an official award.

The Procurement Integrity Act, 41 U.S.C. § 423(a) (2006), prohibits any present or former official of the United States, with respect to a federal agency procurement, from "knowingly" disclosing contractor bid or proposal information or source selection information before the award of a federal agency procurement contract to which the information relates. The statute defines source selection information to include bid and proposal prices, source selection and technical evaluation plans, technical and cost/price evaluations of proposals, competitive range determinations, rankings of bids/proposals, and reports/evaluations of source selection panels, boards, or advisory councils. 41 U.S.C. § 423(f)(2).

While, as the agency has acknowledged in notifying our Office that it intended to take corrective action in response to East West's supplemental protest, there were defects in the award process here, the record fails to demonstrate that a prejudicial procurement integrity violation occurred. There is no evidence that any agency official disclosed East West proposal information to Integrity. Further, the only item arguably fitting within the definition of source selection information that was disclosed was that Integrity's proposal had been selected for award, and the protester has not shown that it suffered any prejudice--prejudice being an essential element of every viable protest--as a result of Integrity's having received notification of its selection several weeks prior to other offerors being notified. See Landsing Pacific Fund, B-237495, Feb. 22, 1990, 90-1 CPD ¶ 200 at 5; Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64 at 6.

² As noted above, the protester also raised supplemental grounds of protest in a subsequent filing, in response to which the agency decided to take corrective action.

The protester further argues that agency officials treated the offerors disparately and demonstrated bias in favor of Integrity by (1) communicating with Integrity, but not the protester, regarding the content of its proposal prior to award, and (2) communicating to Integrity that it was in line for award, while failing to disclose this information to East West. In response to the first allegation, the agency notes that the communications in question took place after Integrity had been selected for award; the agency also argues that the exchanges did not constitute improper discussions because Integrity was not given the opportunity to revise its proposal in response to them. Moreover, even if the exchanges that took place at the May 5 meeting pertaining to Integrity's proposed staffing plan could arguably be viewed as a reopening of discussions, there is no evidence that the protester was prejudiced by the agency's failure to also reopen discussions with it--and, in any event, the corrective action proposed by the agency renders the matter academic. With regard to the protester's allegation that agency officials demonstrated bias in favor of Integrity by notifying it that it was in line for award while representing to East West that they did not know why Integrity representatives were behaving as if they had been notified of award, even to the extent that the agency's representations were misleading, we fail to see that they in any way establish bias on the part of agency officials in the source selection process.

Finally, East West argues that the agency's procurement integrity investigation was inadequate because the contracting officer who conducted it was aware of (despite not being present at) the meeting between NIH officials and Integrity representatives on November 5 and thus was arguably implicated in the alleged wrongdoing. The protester has not demonstrated--and we fail to see--how mere awareness of the meeting demonstrates wrongdoing on the part of the contracting officer.

The protest is denied.

Lynn H. Gibson
Acting General Counsel